No. 82-958

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1982

McDonough Power Equipment, Inc.,
Petitioner,

vs.

BILLY G. GREENWOOD, a minor child, by his parents and natural guardians, JOHN G. GREENWOOD and FREDA GREENWOOD, JOHN G. GREENWOOD, individually; and FREDA GREENWOOD, individually,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF ON THE MERITS

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QUESTIONS PRESENTED FOR REVIEW

1. Was Certiorari improvidently granted?

2. Is Petitioner's claim of deprivation of its constitutional right of trial by jury reviewable?

3. Did the Court of Appeals correctly rule Respondent's right to peremptory challenge was impaired?

4. Did the Court of Appeals correctly rule the suppressed information indicated probable bias?

5. Was the Court of Appeals correct in not remanding the case for a hearing?

6. Is petitioner entitled to entry of judgment upon the verdict of the jury?

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ADDITIONAL RULES THE CASE INVOLVES

1. U.S.D.C., Kan. Rule 23a

Lawyers appearing in this Court, as well as their agents or employees, shall refrain from approaching

jurors who have completed a case, unless authorized by the Court. Such authorization will be considered only upon formal application to the Court and hearing at which just cause shall be shown.

2. Rule 606(b), Federal Rules of Evidence

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear

upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

3. U.S.D.C., Kansas Oath Administered to Petit Jury.

You and each of you do solemnly swear that when you are examined by the court or counsel as to your qualifications to serve as jurors at this term of court, you will true answers make to such questions as may be propounded to you touching your qualifications to serve a jurors. So help you God.

STATEMENT OF THE CASE

Respondent finds it necessary to restate the case. Petitioner's "Statement of the Case" contains statements which do not appear in the record, is written in overly subjective terms, and misstates the holding below.

This is a product liability action which stems from the loss of both feet by three-year-old Billy Greenwood when he came in contact with the blades of a Snapper riding mower manufactured and sold by Petitioner. Respondent's theory of liability was that of strict liability under Restatement (Second), Torts §402A. Respondent adduced proof that the lawnmower in question was defective in that:

(a) The blade was exposed below the deck in that:

(1) the blade bar as manufactured was not straight within Petitioner's manufacturing tolerances such that the blade level was below the deck, causing or at least aggravating the injury to Respondent's left foot;

(2) defectively designed since proper design called for the blade to be recessed inside the deck more than one-eighth inch as designed; and

(b) The blade brake-clutch was defectively designed in

(1) failure to provide emergency method of controls (deadman control), in connection with

(2) inadequate stopping time, and

(3) durability.

The case was submitted to the jury under Respondent's theory of strict liability. The court allowed the jury to compare the fault of Petitioner, Jeffrey Morris (operator of the mower), Ira Morris (owner of the mower), and Freda Greenwood Billy's mother). The ultimate apportionment of fault by the jury was:

Defendant -- 0%
Jeffrey Morris -- 20%
Ira Morris -- 45%
Freda Greenwood -- 35%

Total -- 100%

In direct disobeyance of the Court's instructions (R. Vol. XXIV 1980) and the verdict

form (J.A.66), the jury assessed damages at Zero Dollars ($0.00). (R. Vol. XIV 1996). The Court instructed the jury to return to deliberate concerning damages, since it was obvious this little boy had lost both feet and suffered some damage. (R. Vol. XXIV 1998-2001). The jury returned again and assessed damages at Three Hundred Seventy-Five Thousand Dollars ($375,000.00), (R. Vol. XXIV 2004). On April 25, 1980, the court entered judgment that Respondent take nothing, that the action be dismissed on the merits, and that Petitioner recover its costs. (R. Vol. II 320).

During voir dire, the jury panel was asked by counsel for Respondent if they or any member of their families had been in an accident and sustained a disability or prolonged pain or suffering. (J.A. 19). Juror Cook answered affirmatively (J.A. 19); he was questioned by Respondent's counsel as to whether a claim was made, questioned as to his impartiality and allowed to remain

on the jury. (J.A. 38-40).[1] Juror Payton

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[1] Petitioner places much significance on this fact and even suggests this is the first factor a Court should consider once it is discovered counsel has been deprived of information in exercising the right of peremptory challenge. Respondent submits Petitioner's point is at best irrelevant and at worst absurd. The question jury foreman Payton failed to answer is a preliminary one. It is a tool to discover whether the juror made a claim as a result of the accident (which itself says a lot about the juror's attitude about claims), what kind of injury, what were the results, or if no claim was made, why not? It is the response to these questions (once the juror has responded affirmatively to the preliminary question) in which counsel is interested when exercising the right to peremptory challenge. Also significant is the opportunity to carefully observe the often more important non-verbal communication cues given as the juror speaks. See National Jury Project, Jury Work, (1983) pp. 11-25 to 11-33; Ekman and Friesen, "Non-Verbal Leakage and Clues to Deception," Psychiatry, (1969), 32, 88-106; Knapp, Essentials of Non-Verbal Communication (1980); Werchick, "Method, Not Madness - Selecting Today's Jury," Trial, Vol. 18, No. 12 (Dec. 1982). It has been recognized that peremptory challenges are often exercised upon the "sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another." Swain v. Alabama, 380 U.S. 202, 220, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965), quoting Lewis v. United States, 146 U.S. 370, 376, 36 L.Ed.1011, 13 S.Ct. 136 (1892).

remained silent. Counsel for Petitioner asked the jurors whether any among them, either themselves, anyone in their immediate family or a neighbor ever had a child injured on any kind of a mechanical device or machinery. (J.A. 52). Juror Cook responded that his son at age 6 got his finger in a bike chain once and at age 13-15 got his hand in a power saw. (J.A. 52-3). Juror Payton remained silent. Counsel for Petitioner asked the jurors whether any among them, either themselves, their immediate family, close friend or a neighbor had ever been injured on any kind of a machine. (J.A. 53). Juror Finnigan responded her husband had been injured on the job 15 years ago. (J.A. 53-4). Juror Payton remained silent. Counsel for Petitioner re-asked the same question but with respect to mechanical devices at home. (J.A. 54). Juror Cook responded that before he even met his wife, she got her hand in a wringer washing machine. (J.A. 54-5). Juror Payton remained silent.

Following the trial, Respondent discovered jury foreman Payton had a son who was injured when a truck tire exploded. (J.A. 88). Under local U.S. District Court Rule 23A, counsel for Respondent filed a motion with supporting affidavits indicating juror misconduct and requested permission to question the jury on whether they had answered the questions truthfully during voir dire, plus seven other matters of concern. (J.A. 66-71). The trial court denied the motion stating Respondent had failed to show "just cause" for the court to infer misconduct and allow the jury to be approached. (J.A. 72). Respondent then filed a second motion, including another affidavit by Respondent's father, a U.S. Navy recruiting officer, stating that the jury foreman's son had applied to enlist in the U.S. Navy and the son's application stated he had been seriously injured in a truck tire explosion. (J.A. 86-88). The trial court "generally overruled" the motion but granted "brief and polite" inquiry to the limited degree of

determining whether juror Payton's son was in an accident as the affidavit affirmed, and if the son sustained a disability or prolonged pain or suffering. (J.A. 89). The trial court stated "the inquiry should be undertaken telephonically or at a place convenient to the juror" and that juror Payton was not to be summoned to Topeka, Kansas, solely for this purpose. (J.A. 89). A conference telephone call was conducted with Respondent's attorney, Petitioner's attorney and juror Payton participating. During the telephone conversation juror Payton acknowledged the fact of injury to his son, but contended that "it did not make any difference whether his son had been in an accident and was seriously injured," "that having accidents are a part of life" and "all his children had been involved in accidents." Respondent requested oral argument and leave of court to subpoena the jurors to give testimony at the hearing on his Motion for a New Trial. (J.A. 90-94). The trial court denied the motion without

argument. (J.A. 106).[2]

In the Court of Appeals, Respondent urged eight different issues justifying a new trial. (Brief of Appellant). One of those issues was whether the trial court erred in denying Respondent's motions to approach the jurors; erred in denying leave

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[2]We find audacious Petitioner's repeated reference to Respondent's asserted failure to report the results of the Payton telephone interview to the trial court and, for the first time ever, a contention the issue was waived by Respondent on that account. Respondent, despite affidavits indicative of juror misconduct, was at first entirely precluded from interviewing the jurors. (J.A. 67;72). Then, after filing a second motion with another supporting affidavit which was generally overruled with a strong suggestion that the matter be handled by telephone, Respondent was limited to a very narrow area of inquiry. (J.A. 86; 89). The trial judge already had made his attitude known, stating, "Frankly, the Court is not overly impressed with the significance of this particular situation." (J.A. 89). Respondent was then denied requested oral argument on his motion for new trial and denied requested leave to subpoena jurors to give testimony at the requested hearing. (J.A. 94;106). Respondent was thwarted in his attempts to make a post-trial record more extensive than that made.

to subpoena jurors to give testimony at a hearing on Respondent's Motion for a New Trial; and whether Respondent was entitled to a new trial for juror misconduct. (Brief of Appellant). Respondent specifically raised his Constitutional right to trial by an impartial jury. (Brief of Appellant at 16). Respondent specifically argued his right to peremptory challenge had been impaired. (Brief of Appellant at 15-20). Petitioner raised no constitutional questions in the Court of Appeals (See Brief of Appellee), nor in its Petition for Writ of Certiorari.

In the Court of Appeals, Respondent pointed out that during the telephone conversation, juror Payton contended that "it did not make any difference whether his son had been in an accident and was seriously injured," "that having accidents are a part of life" and "all of his children had been involved in accidents." (Brief of Appellant at 7). Petitioner expressly adopted these

facts but added that jury foreman Payton did not regard the injury as "severe" and did not result in "prolonged pain and suffering." (Brief of Appellee at 18). Petitioner argued (1) there was no juror misconduct (Brief of Appellee at 18), (2) Respondent had not shown impairment of his right to peremptory challenge in light of the inferences to be drawn from the manner in which Respondent did exercise peremptory challenges (Brief of Appellee at 18-19), (3) that although Consolidated Gas and Equipment Co. of America v. Carver, 257 F.2d 111 (10th Cir. 1958) and Photostat Corp. v. Ball, 338 F.2d 783 (10th Cir. 1964) were correct, they were distinguishable (Brief of Appellee at 19-20), and (4) Respondent failed to timely object to juror Payton's disqualification (Brief of Appellee at 20).

In the Court of Appeals, (1) Petitioner at no time suggested that granting Respondent a new trial based upon prejudicial impairment of Respondent's right to peremptory challenge

would deprive Petitioner to its right to trial by jury, as contended in this Court; (2) Petitioner at no time contended that Plaintiff's claim of juror misconduct was waived by failing to present evidence on that issue to the trial court, as contended in this Court; and (3) Petitioner at no time suggested the Court of Appeals was applying an erroneous standard of law, as contended in this Court; to the contrary, Petitioner said:

> The cases cited by Plaintiff quite correctly hold that withholding information called for in answer to a question on voir dire by a venireman can constitute ground for new trial if, and only if, the record shows probable bias on the part of the juror with consequent prejudice to the unsuccessful litigant. Consolidated Gas and Equipment Co. of America v. Carver, 257 F.2d 111 (10th Cir. 1958) and Photostat Corp. v. Hall, 338 F.2d 783 (10th Cir. 1964). In both cases information concerning injuries, claims and suits involving the veniremen and their immediate families was withheld and the defendant in a bodily injury suit successfully claimed prejudice. (Brief of Appellee at 19. Emphasis added in first sentence; emphasis in original in last sentence).

Apparently Petitioner approved of the law until it was applied equally to Plaintiffs

and Defendants.

Contrary to Petitioner's assertions in its Brief on the Merits, the Court of Appeals held Payton's refusal to answer the question posed on voir dire prejudiced Respondent's right to peremptory challenge as a matter of law because the information concealed was of sufficient cogency and significance to cause the Court to believe counsel was entitled to know of it. (687 F.2d at 342). Further contrary to Petitioner's assertions in its Brief on the Merits, the Court of Appeals held that the suppressed information indicated probable bias of juror Payton because it revealed a particularly narrow concept of what constitutes a serious injury. (687 F.2d at 343). Further contrary to Petitioner's assertions in its Brief on the Merits, the Court of Appeals did not base its decision upon what influence the suppressed information might or would have had, because such an inquiry would be unworkable. (687 F.2d at 342 and at n. 1, 342-3).

SUMMARY OF ARGUMENT

Certiorari was improvidently granted. Courts, including this Court, agree impairment of the important right of peremptory challenge is reversible error without a showing of prejudice. The only issue the case presents is whether Respondent's right of peremptory challenge was impaired under the particular circumstances in this civil product liability case. The opinions of the Tenth Circuit Court of Appeals in Consolidated Gas, supra, and Photostat, supra, which are established precedent for the decision below and which Petitioner attacks here, are the law of this case because Petitioner told the Court of Appeals those decisions were correct.

Petitioner's claim of deprivation of its Seventh Amendment right to trial by jury is not reviewable because it was never raised in the court below nor in the Petition for Writ of Certiorari. Even if reviewable, the Seventh Amendment does not foreclose an

appellate court's duty to correct errors of law, here impairment of the right of peremptory challenge.

The Court of Appeals correctly ruled Respondent's right of peremptory challenge was impaired. Impairment of the right of peremptory challenge is nonetheless an impairment of a substantial right irrespective of the good faith or intent of a venireman in suppressing requested significant information. The right of challenge includes the incidental right that information elicited on voir dire shall be the truth. Here, in suppressing the fact of sericus injury to his son in a product liability context for which a claim was not made, jury foreman Payton did not tell the truth. In any personal injury case, involvement with injuries by a juror or his family is important information to counsel on both sides. It is the means by which both counsel develop and explore in a specific personal context the attitudes and preconceived opinions of veniremen toward injuries and making claims for money as a result

of injuries. No personal injury attorney, plaintiff or defense, can honestly argue this is not significant information he or she seeks to discover on voir dire for the dual purpose of uncovering attitudes which lead to challenges for cause and informed use of the right of peremptory challenges.

The inquiry ends here. Impairment of the right of peremptory challenge with resulting reversible error is established. We nevertheless respond to other arguments made by Petitioner.

The Court of Appeals correctly ruled the information suppressed by jury foreman Payton indicated probable bias. This inquiry begins with recognition that due process requires trial by an impartial jury, a necessary and important part of which is the right of peremptory challenge. Next we must acknowledge the fact there are many persons who harbor a strong bias against negligence or product liability actions wherein injured persons seek "blood money." Under the undisputed facts developed in the post-trial

telephone interview, jury foreman Payton revealed not only a calloused concept of what constitutes a serious injury, but also a cavalier attitude toward making product-related claims. A comment on voir dire like "accidents are a part of life" is a bell-ringer to any plaintiff's personal injury trial attorney. Jury foreman Payton's suppression on voir dire of a product-related injury to his son coupled with an attitude that "accidents are a part of life" is indicative of probable bias against product-related claims.

This Court has never required a showing of actual bias where impairment of the right of peremptory challenge is at issue. Indeed, such a requirement would be wholly inconsistent with the entire purpose of peremptory challenge. In other contexts, this Court historically has not required a particular showing of actual bias which directly influenced jury deliberations to the prejudice of the aggrieved party; has regarded the absence of a balanced perspec-

tive in jury selection procedures as a recognizable form of prejudice, without requiring a specific showing of bias against the individual defendant; has conclusively presumed juror bias and prejudice even where the jurors involved denied it; has utilized a presumption of prejudice and placed the burden on the Government to overcome the presumption; and has insisted that criminal defendants be given a fair and meaningful opportunity in voir dire to determine whether prospective jurors are biased. Given that fairness and reliability of jury determinations are at stake, this is not too high a standard.

The Court of Appeals was also correct in not remanding the case for a hearing. Impairment of the right of peremptory challenge is reversible error without a showing of prejudice. Remand for a hearing to determine the probable or actual bias of jury foreman Payton is thus superfluous. Additionally, a hearing to determine the actual or probable bias of jury foreman Payton through the mouth of jury foreman

Payton would surely be a hollow and futile opportunity. This Court, as well as others, has recognized that proof of actual bias is virtually impossible. Finally, in view of Rule 606(b), Fed.R.Evid., remand for a hearing may be pointless.

Petitioner is not under any circumstances entitled to entry of judgment upon the verdict of the jury because there remain several additional assignments of error not decided below. If the judgment of the Court of Appeals not be affirmed, the only appropriate course is to remand the case to the Court of Appeals.

ARGUMENT AND AUTHORITIES

I. CERTIORARI WAS IMPROVIDENTLY GRANTED

Now that the Court has the entire record, Respondent suggests the Court take a second look at the grant of certiorari in this case. As noted, Petitioner adopted the facts pertaining to juror Payton in its brief in the

Court of Appeals. We wonder why Petitioner continues to refer to the Payton interview using such terms as "Plaintiff's counsel's report" and "Plaintiff's allegations." Legally too Petitioner has changed its position. As noted, Petitioner told the Court of Appeals its decisions in Consolidated Gas, supra, and Photostat, supra, were correct but distinguishable. That is the law of this case. Now Petitioner vehemently attacks both decisions which are precedent and support for the decision below.

On this record, Respondent submits certiorari was improvidently granted.

II. PETITIONER'S CLAIM OF DEPRIVATION OF ITS CONSTITUTIONAL RIGHT OF TRIAL BY JURY IS NOT REVIEWABLE.

Petitioner never contended in the Court of Appeals that granting Respondent a new trial for prejudicial impairment of the right to peremptory challenge would deprive Petitioner of its Seventh Amendment right to trial by jury. To the contrary, similar

rulings in Consolidated Gas, supra, and Photostat, supra, were stated to be correct by Petitioner. Neither did Petitioner claim deprivation of Constitutional rights or even raise Constitutional questions in its Petition for Writ of Certiorari. Questions not raised below, nor in the Petition for Certiorari - especially Constitutional questions - will not be considered for the first time in the Supreme Court. Supreme Court Rules 21.1(a) and 34.1(a); Cardindale v. Louisiana, 394 U.S. 437, 22 L.Ed.2d 398, 89 S.Ct. 1162 (1969); Tacon v. Arizona, 410 U.S. 351, 35 L.Ed.2d 346, 93 S.Ct. 998 (1973); Andrews v. Louisville & N.R.Co., 406 U.S. 320, 32 L.Ed.2d 95, 92 S.Ct. 1562 (1972); Quilloin v. Walcott, 434 U.S. 246, 253 n. 13, 54 L.Ed.2d 511, 98 S.Ct. 549 (1978).[3]

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[3]Even if reviewable, Petitioner was not deprived of its Constitutional right to trial by jury. The Court of Appeals did not re-examine any facts found by the jury. Granting Respondent a new trial for impairment of Respondent's right to peremptory challenge does not deprive Petitioner of its Seventh Amendment right to trial by jury. Nothing in the Seventh Amendment forecloses an appellate court's duty to correct errors

III. THE COURT OF APPEALS CORRECTLY RULED RESPONDENT'S RIGHT TO PEREMPTORY CHALLENGE WAS IMPAIRED.

Petitioner's entire argument asolutely ignores that we believe is the only issue in this case: impairment of Respondent's right to peremptory challenge.

(a) Impairment of the right of peremptory challenge is reversible error without a showing of prejudice.

In ruling that a prosecutor could constitutionally use his peremptory challenges to strike all of the accused's race from the jury, the Court in Swain v. Alabama, 380 U.S. 202, 219, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965) said:

> The denial or impairment of the right is reversible error without a showing of prejudice, Lewis v. United States, 146 U.S.370, 36 L.ed 1101, 13 S.Ct. 136; Harrison v. United States, 163 U.S. 140, 41 L.ed. 104, 16 S.Ct. 961; cf. Gulf, Colorado & Santa Fe R.Co. v. Shane, 157 U.S. 348, 39 L.ed. 727, 15 S.Ct.

(continuation of Footnote 3) of law. See e.g. Ballwanz v. Isthmian Lines, Inc., 319 F.2d 457, 460 (9th Cir. 1963), cert. denied, 376 U.S. 970, 12 L.Ed.2d 84, 84 S.Ct. 1136 (1964).

> 641. "For it is, as Blackstone says, an arbitrary and capricious right; and it must be exercised with full freedom, or it fails or its full purpose." Lewis v. United States, 146 U.S. 370, 378 36 L.Ed. 1011, 1014, 13 S.ct. 136.

Accord: Carr v. Watts, 597 F.2d 830 (2nd Cir. 1979). The point was succinctly stated by the Court in Shulinski v. Boston & M.R.R. 83 N.H. 86, 139 A. 189, 191 (1927):

> The question is whether a proper tribunal was established, and not whether an improperly established tribunal acted fairly.

Contrary to Petitioner's assertions, the "good faith" of the non-disclosure and the "actual bias" of the juror are completely irrelevant to the determination of impairment of peremptory challenge. The whole purpose of the right of peremptory challenge is to allow removal of "jurors who, in the opinion of counsel, have unacknowledged or unconscious bias." Darbin v. Nourse, 664 F.2d 1109, 1113 (9th Cir. 1981). Were the juror actually biased, he would be excused for cause. All the party need prove is that by some means the right to exercise

peremptory challenge was impaired.

(b) The right of challenge includes the incidental right that juror responses be true.

"Voir dire" means "to speak the truth." All prospective jurors in the United States District Court for the District of Kansas, prior to answering questions on voir dire, are given this oath:

> You and each of you do solemnly swear that when you are examined by the court or counsel as to your qualifications to serve as jurors at this term of court, you will true answers make to such questions as may be propounded to you touching your qualifications to serve as jurors. So help you God.

Of course, the right to challenge has little meaning if it is not accompanied by the right to ask relevant questions on voir dire. The statutory right of peremptory challenge, given by Congress in furtherance of securing a Constitutionally impartial jury and preserving the integrity of jury proceedings, includes the incidental right that information elicited of prospective jurors on voir dire shall be the truth. Photostat Corp. v. Ball, 338 F.2d 783 (10th Cir. 1964).

(c) In a personal injury case, a juror's prior involvement with injuries is important information to counsel on both sides.

In any personal injury case, a prospective juror's involvement in injury accidents is a crucial subject into which both plaintiff and defense counsel inquire for the dual purpose of uncovering attitudes which lead to challenges for cause and peremptory challenge.

Defense counsel are interested for a number of good reasons. For example, if a juror or someone in the juror's family or a friend has been injured and made a claim, defense counsel want to know if his client was involved; if so, the juror may very well not be able to put that aside. Also, defense counsel know that jurors who, or whose family members have been involved in an accident and have made a claim can reasonably be expected to identify with the plaintiff. They are much more likely to hold a firm belief that a person who has been injured through the fault of another is

entitled to compensation. They are also, depending upon the type of their experience, more likely to be aware of insurance aspects, the fact that counsel fees and expenses will be deducted from the damage award, and the fact that some insurance liens or workers' compensation subrogation interest may have to be paid from the damage award. During questioning defense counsel may look for signs of consumerist tendencies or attitudes in the jurors' responses. On the other hand, defense counsel might not challenge a juror just because a juror has been injured and made a claim. Perhaps counsel feels a good rapport with the juror. Perhaps the injury occurred and the claim was made in a no-fault context. Perhaps the juror, through gesture or body language, appears half-way apologetic about having made a successful claim. Or maybe counsel just feels less comfortable with three other jurors and decides, using his best intuitive judgment, to use his peremptory challenges on three more unfavorable jurors.

Plaintiff's counsel is likewise interested in jurors' personal injury experiences. Once a juror responds that he or a family member has been injured, counsel needs to know if a claim was made. If a claim was not made, why not? Responses encompass the entire range of human attitudes on the subject - some reveal bias, some do not. For example, one might receive a response like "I don't believe in making claims for money," or "I think everyone should take responsibility for their own acts," or "Accidents are just a part of life." On the other hand, one might receive responses like "I didn't know I could," or "It wasn't very serious," or "I settled with the other guy without a claim." Additional questions are asked depending upon the response received. The information developed may lead to a challenge for cause (e.g. where the juror holds some religious, philosophical or personal opinion that no one deserves money for being injured; or the juror could not award money damages for pain and suffering, etc.). The information developed at least certainly enables

counsel to make an informed use of peremptory challenges (e.g. "bellringers" to plaintiff's counsel are jurors' expressions of ideas like "a reward" for "an accident," and "accidents are a part of life"). On the other hand, plaintiff's counsel might have good reason not to challenge a juror who has been injured but not made a claim. Perhaps counsel is satisfied with the response. Perhaps counsel feels a good rapport with the juror. Perhaps the injury was taken care of by workers' compensation without the necessity of a formal claim.[4] Or maybe, considering all the responses of all the jurors, counsel uses his best intuitive judgment to deselect three other jurors who counsel considers lean in favor of defendant.[5]

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[4] In response to counsel for Respondent's question, Juror Cook explained his wife's injury involved workers' compensation. (J.A. 19,38-9).

[5] For all the reasons stated and others, Petitioner's suggestion that a court look to whether the complaining party exercised a peremptory challenge against anyone who revealed information similar to that concealed

Asking veniremen about prior injuries to each of them or family members is the primary means used by both plaintiff and defense counsel to determine jurors' opinions

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(continuation of Footnote 5)
entirely misses the point. Also, the question counsel must decide is not whether a particular juror is in fact partial, but which jurors are most likely to be partial, based upon the information given. This is especially so under the strike system utilized in the trial court, where all the veniremen are known to the parties before striking begins. See Swain v. Alabama, supra, 380 U.S. at 221.

In response to questioning by counsel for Petitioner, jurors Cook and Finnigan described injuries for which a claim was not made. (J.A. 52-55). In accordance with usual procedure, counsel for Respondent did not conduct another voir dire after counsel for petitioner. Obviously, based upon all the other factors which are also important to counsel in deciding how to exercise the right of peremptory challenge, counsel for Respondent either was satisfied that the state of mind of jurors Cook and Finnigan was not antagonistic to Respondent's claim or decided to exercise his challenges on three more unfavorable jurors. This does not mean the information suppressed by jury foreman Payton was unimportant; it is simply one important factor which, depending upon the individual venireman, may or may not tip the balance and result in a peremptory challenge.

toward injuries and claims within the limited time allotted voir dire in federal court. Indeed, in this case, it was the only means utilized.

If a juror conceals information about an injury experience, both counsel are deprived of information which may lead to a challenge for cause, and certainly of information of sufficient significance that counsel are entitled to know of it in exercising the right to peremptory challenge.

Under the undisputed facts in this case, jury foreman Payton failed to reveal a broken leg injury to his son as a result of a truck tire explosion, despite several opportunities in questioning by both counsel. Even after other jurors' responses gave Mr. Payton further indication of the information sought,[6] Mr. Payton continued to remain silent. Essentially, Mr. Payton's post-trial stand was that the voir dire questions were trivial questions

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[6]Juror Cook even related such a minor incident as his six-year-old son getting his finger caught in a bike chain once. (J.A. 52).

and made no difference to him. However, counsel was deprived of information and opinions which may have led to a challenge for cause; counsel was certainly deprived of information and opinions of sufficient significance that counsel was entitled to know of it when exercising the "arbitrary and capricious right" to peremptory challenge which "must be exercised with full freedom, or it fails of its full purpose." Lewis v. United States, supra, 146 U.S. at 378.

Several courts have held that in a personal injury case a juror's prior experience with injuries and/or injury claims by or against himself is significant information counsel is entitled to know in exercising the right of peremptory challenge. In Drury v. Franke, 247 Ky. 758, 57 S.W.2d 969, 984 (1933), where a juror had not revealed a personal injury claim pending against him, the court stated:

> The information which was sought to be elicited by the question addressed to the jury panel, was

> pertinent to enable the plaintiffs to intelligently exercise their challenges, a valuable right.

The Court in Drury, supra, 57 S.W.2d at 984-5, went on to summarize the principles announced in Shulinksy v. Boston & Maine R.R., supra, as follows:

> When the right of challenge is lost or impaired, the statutory conditions and terms for setting up an authorized jury are not met; the right to challenge a given number of jurors without showing cause is one of the most important rights to a litigant; any system for the empaneling of a jury that prevents or embarrasses the full, unrestricted exercise of the right of challenge must be condemned; a litigant cannot be compelled to make a peremptory challenge until he has been brought face to face in the presence of the court, with each proposed juror, and an opportunity given for such inspection and examination of him as is required for the due administration of justice; the right to reject jurors by peremptory challenge is material in its tendency to give the parties assurance of the fairness of a trial in a valuable and effective way; the terms of the statutes with reference to peremptory challenges are substantial rather than technical; such rules, as aiding to secure an impartial, or avoid a partial,

jury, are to be fully enforced; the voir dire is of service not only to enable the court to pass upon a juror's qualifications, but also in assisting counsel in their decision as to peremptory challenge; the right of challenge includes the incidental right that the information elicited on the voir dire examination shall be true; the right to challenge implies its fair exercise, and, if a party is misled by erroneous information, the right of rejection is impaired; a verdict is illegal when a peremptory challenge is not exercised by reason of false information; the question is not whether an improperly established tribunal acted fairly, but it is whether a proper tribunal was established; if false information prevents a challenge, the right is so disabled and crippled as to lose its essential value and efficacy, as to amount to its deprivation; the fact that a juror disqualified either on principal cause or to the favor has served on a panel is sufficient ground for setting aside the verdict, without affirmatively showing that the fact accounts for the verdict; it is highly important that the conflicting rights of individuals should be adjudged by jurors as impartial as the lot of humanity will admit; next to securing a fair and impartial trial for parties, it is important that they should feel that they have had such a trial, and anything that tends to impair their belief in this respect must seriously diminish

> their confidence and that of the public generally in the ability of the state to provide impartial tribunals for dispensing justice between its subjects; the fact that the false information was unintentional, and that there was no bad faith, does not affect the question, as the harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant; while willful falsehood may intensify the wrong done, it is not essential to constitute the wrong; that the injury is brought about by falsehood, regardless of its dishonesty, and the effect of the information is misleading, rather than a purpose to give misleading information is the gist of the injury; when the fact appears that false information was given, and that it was relied upon, the right to a new trial follows as a matter of law.

Drury, supra, has been somewhat qualified in Kentucky. In Crutcher v. Hicks, 257 S.W.2d 539 (Ky. 1953), the Court stated that if the false information is of such a character as to indicate probable bias on the part of the juror, it may be presumed that a free exercise of the right of peremptory challenge has been so restricted as to result in prejudice to the party affected. Also see Kansas City Southern R.

Co. v. Black, 395 P.2d 416 (Okla. 1964) - new trial granted where one juror failed to reveal that he was himself considering suing defendant, and another juror failed to reveal her son had recovered damages in another personal injury suit; Dalton v. Kansas City Transit Inc., 392 S.W.2d 225 (Mo. 1965) - new trial granted defendant where juror concealed numerous prior claims, because he thought them unimportant; Morris v. Zac Smith Stationery Co., 274 Ala. 467, 149 So.2d 810 (1963) - new trial granted defendant where juror failed or refused to reveal previous negligence suit by son; Wright v. Bernstein, 23 N.J. 284, 129 A.2d 19 (1957) - new trial granted defendant where juror failed to state mother had pending negligence action; Marshall v. Brown, 608 S.W.2d 105 (Mo.App. 1980) - new trial granted defendant where juror failed to reveal prior claim; Kaminski v. Kansas City Public Service Co., 175 Kan. 137, 259 P.2d 207 (1953) - new trial granted defendant where two jurors failed to reveal prior personal injury claims; Pierce v. Altman, 147 Ga.App. 22, 248 S.E.2d

34 (1978) - new trial granted plaintiff where juror failed to reveal he had been a defendant in a personal injury action four years earlier; Headrick v. Dowdy, 450 S.W.2d 161 (Mo. 1970) - new trial granted plaintiff where jury foreman failed to reveal he had been unsuccessful plaintiff in personal injury action; Fiorelli v. Yellow Cab Co. of Cleveland Inc., 30 Ohio Ops 2d 232, 190 N.E.2d 58 (1963) - new trial granted defendant where juror with pending personal injury claim remained silent on excuse she did not think it concerned defendant.[7]

Respondent submits the Court of Appeals correctly ruled the information concealed by jury foreman Payton was of sufficient significance that Respondent was entitled to

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[7] See Broeder, Voir Dire Examinations: An Empirical Study, 38 So.Cal.L.Rev. 503 at 510-515 (1965) for an enlightening actual case study discussion of jurors guilty of voir dire deception, based on a study of 23 cases tried in a midwestern Federal District Court and involving 225 juror interviews.

know of it, thereby impairing Respondent's right to peremptory challenge. Because impairment of the right of peremptory challenge is reversible error without a showing of prejudice, the inquiry ends here.

Respondent will, nevertheless, proceed to respond to the arguments made by Petitioner.[8]

IV. THE COURT OF APPEALS CORRECTLY RULED THE SUPPRESSED INFORMATION INDICATED PROBABLE BIAS.

(a) Due process requires trial by an impartial jury, a necessary part of which is the peremptory challenge.

"A fair trial in a fair tribunal is a basic requirement of due process." In re

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[8] Petitioner suggests harmless error is involved in this case. An error is harmless where, for example, a challenge for cause should have been sustained but the juror was challenged peremptorily by one who did not exhaust his peremptory challenges. Impairment of the right to peremptory challenge is never harmless error. Allowing a case to be decided by a juror in whose mind exists a probable bias is never harmless error.

Murchison, 349 U.S. 133, 136, 99 L.Ed. 942, 75 S.Ct. 623 (1955). A fair trial presupposes an impartial, indifferent jury. Irvin v. Dowd, 366 U.S. 717, 722, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1951).

A criminal defendant's right to an impartial jury arises from both the Sixth Amendment and principles of due process. See Ristaino v. Ross, 424 U.S. 589, 595, n. 6, 47 L.Ed. 2d 258, 96 S.Ct. 1017 (1976). Civil litigants, like criminal defendants, have a constitutionally protected right to complete consideration of their case by an impartial jury. Hasson v. Ford Motor Co., 185 Cal. Rptr. 654, 650 P.2d 1171 (1982).

The right to an impartial jury carries with it the concomitant right to take reasonable steps designed to insure that the jury is impartial. Perhaps the most important technique available to serve this end is the jury challenge. Peremptory challenges, unlike those for cause, may be made for any reason, or for no reason. Swain v. Alabama, 380 U.S. 202, 13 L.Ed.2d 759, 85 S.Ct. 824 (1965).

Peremptory challenges are a "necessary part of trial by jury." Id. at 219. Indeed, the first Justice Harlan, speaking for a unanimous Court, stated the right to challenge was "one of the most important of the rights secured to the accused" and that "[a]ny system for the empanelling of a jury that [prevents] or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." Pointer v. United States, 151 U.S. 396, 408, 38 L.Ed.208, 14 S.Ct. 410 (1894). Especially see People v. Williams, 29 Cal.3d 392, 174 Cal.Rptr. 317, 628 P.2d 869 (1981) for an excellent and thorough discussion, with scientific studies noted which are hereby incorporated by reference, of the importance of voir dire and its significance in relationship to the right of peremptory challenge.

> Our courts have become increasingly aware that bias often deceives its host by distorting his view not only of the world around him, but also of himself. Hence although we must presume that a potential juror is responding

in good faith when he asserts broadly that he can judge the case impartially (citation), further interrogation may reveal bias of which he is unaware or which, because of his impaired objectivity, he unreasonably believes he can overcome. And although his protestations of impartiality may immunize him from a challenge for cause (see Pen. Cod. § 1076), they should not foreclose further reasonable questioning that might expose bias on which prudent counsel would base a peremptory challenge. For instance, although a juror has asserted his willingness to presume defendant's innocence, "careful counsel would exercise a peremptory challenge if a juror replied that he could accept this proposition of law on an intellectual level but that it troubled him viscerally because folk wisdom teaches that where there is smoke there must be fire." (United States v. Blount, (6th Cir. 1973), 479 F.2d 650, 651.)

* * *

...it can no longer be argued seriously that voir dire is properly restricted to a search for legally cognizable bias only.

It has always been understood that public support for a system of justice depends not only on the capacity of that system to render justice in fact, but also on its ability to project to the parties and public an unimpeach-

able image of fairness. The peremptory challenge has long acted as a fixative for preserving that image.

* * *

Although it is still ordinarily true that no reason must be given for the exercise of peremptory challenges (citation), it is also true they are of little value to the accused or the state if counsel is forced to utilize them unaided by relevant information.

* * *

Because the peremptory challenge is a critical safeguard of the right to a fair trial before an impartial jury (see Swain v. Alabama (1965) 380 U.S. 202, 219-221 [13 L.Ed.2d 759, 771-773, 85 S.Ct. 824]; Pointer v United States (1894) 151 U.S. 396, 408 [38 L.Ed.208, 213-214, 14 S.Ct. 410]), questions directed at its intelligent exercise manifestly fall within the bounds of the "reasonable inquiry" to which counsel are entitled. (Pen. Code, § 1078.)

The federal courts agree, acknowledging that "if [the constitutional right to an impartial jury] is not to be an empty one, the defendants must, upon request, be permitted sufficient inquiry into the background and attitudes of the jurors to enable them to exercise intelligently their peremptory challenges." (United States v. Dellinger, (7th Cir.

1972) 472 F.2d 340, 368, see also Nebraska Press Assn. v. Stuart, (1976) 427 U.S. 539, 602 [49 L.Ed. 2d 683, 722-723, 96 S.Ct. 2791] (conc. opn. of Brennan, J.); Swain v. Alabama, supra, 380 U.S. 202, 218-219 [13 L.Ed. 2d 759, 771]; United States v. Robinson, (D.C. Cir. 1973) 475 F.2d 376, 381; United States v. Lewis, (7th Cir. 1972) 467 F.2d 1132, 1138.) As the United States Supreme Court recently observed, "lack of adequate voir dire impairs the defendant's right to exercise peremptory challenges..." (Rosales-Lopez v. United States, (1981) 451 U.S. 182, [68 L.Ed.2d 22, 28, 101 S.Ct. 1629].) The high court in Rosales-Lopez reaffirmed Swain v. Alabama, supra, 380 U.S. at pp. 218-219 [13 L.Ed. 2d at p. 759], by recognizing the connection between voir dire and the exercise of peremptory challenges: "The voir dire in American trials tends to be extensive and probing, operating as a predicate for the exercise of peremptories...."

Id. at 29 Cal.3d at 402-406, 628 P.2d at 873-876.

(b) The suppressed information indicated probable bias.

At times Petitioner appears to argue that a new trial is warranted only if the trial court finds actual bias. (Petitioner's Brief on the Merits at 31). At other times

Petitioner appears to concede that the right to peremptory challenge is impaired where the suppressed information is "indicative of an unfavorable attitude toward ... the complaining party" but not indicative of a bias so serious that a challenge for cause would have been granted. (Petitioner's Brief on the Merits at 19). Apparently then Petitioner agrees bias may be implied from a juror's suppression of information requested on voir dire.

As observed by Justice Stevens in Rosales-Lopez v. United States, 451 U.S. 182, 196, 68 L.Ed.2d 22, 101 S.Ct. 1629 (1981) (dissenting opinion), before any citizen may be permitted to sit in judgment, some inquiry into potential bias is essential. Such bias can arise from two principal sources: a special reaction to the facts of the particular case, or a special prejudice against an individual litigant that is unrelated to the particular case. Id. It is the former with which we are here concerned.

Just as it is common knowledge that many persons cannot, for whatever valid or

invalid reason, award money damages for pain and suffering, so too we should acknowledge the fact that there are many potential jurors who harbor strong prejudices against negligence or product liability actions wherein injured persons are perceived as greedy.[9]

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[9] Although plaintiffs' personal injury trial attorneys are well aware of the existence of this attitude, especially in rural midwestern areas, it is difficult to show the Court its pervasiveness. Although few such cases reach the appellate courts because jurors holding such an attitude are normally excused for cause and error is not predicated thereon, some cases have been reported. In the following cases involving personal injury or wrongful death, it was held either that reversible error was committed in not excusing for cause jurors holding a bias against such actions, or that such jurors were properly excluded for cause: Quill v. Southern Pac. Co., 140 Cal. 268, 73 Pac. 991 (1903), where two jurors "felt a prejudice against suits to recover damages for personal injuries, believing that many such were brought without merit, and that the number was constantly increasing" Id. at 992; Fitts v. Southern Pac. Co., 149 Cal. 310, 86 Pac. 710 (1906) juror held a prejudice against negligence actions; Slater v. United Traction Co., 172 App.Div. 404, 157 N.Y.S. 909 (1916) - juror held a prejudice against negligence actions; Moon v. Fickle, 3 App.Div.2d 802, 160 N.Y.S. 2d 387 (1957) - juror held a prejudice against negligence actions; Crawford v. Manning, 542 P.2d 1091 (Utah 1975) - new trial granted plaintiff where juror held a prejudice against negligence actions even though the juror stated she could render a verdict free of

Persons holding such an attitude generally view injured persons as seeking a reward for having an accident, rather than obtaining fair and just compensation for an injury suffered through the fault or in the use of a defective product of another. Such a bias is consistent with the attitude that "accidents are a part of life," or in other words, no one should get rich as a result of being in an accident. Such bias is as pervasive and as strongly held as a racial bias.

The trial judge observed that a juror whose son had been injured in a products liability setting would be the type of juror that plaintiff would be looking for in this case (Joint Appendix, p. 89-90). Just the opposite is true. If no claim nor any in-

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(Continuation of Footnote 9)
bias and prejudice; Abernathy v. Eline Oil Field Services, Inc., 650 P.2d 772 (Mont. 1982) - new trial granted plaintiff for manifest error by trial judge in failing to excuse for cause a juror who indicated she had negative feelings about suing to recover money for death of a child.

vestigation into the potential existence of a claim is made by the juror then this may very well be one of those persons who are biased against such claims. It is the attitude about claims and not the fact of injury that is the pertinent fact.

Under the undisputed facts in this case, jury foreman Payton failed to reveal a broken leg injury to his son as a result of a truck tire explosion, despite several opportunities in questioning by both counsel. Under the undisputed facts developed in the post-trial telephone interview, jury foreman Payton revealed not only a calloused concept of what constitutes a serious injury, but also a cavalier attitude toward making product-related claims.[10] The Court of Appeals was certainly correct in holding the information suppressed by jury foreman Pay-

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[10] Petitioner entirely misperceives the significance of jury foreman Payton's undisputed post-trial comments when Petitioner assumes the comments are only indicative of Mr. Payton's attitude toward pain and suffering and his assessment of damages.

ton indicated his probable bias.

Such a decision involving implied bias is consistent with the decisions of this Court. The entire purpose of our jury system is to provide for fair and reliable determination of disputes between litigants. That purpose simply cannot be achieved if the jury's deliberations are tainted by bias and prejudice. Fairness and reliability are assured only if the verdict is based upon the evidence presented in the courtroom, and not upon sympathy, passion or prejudice. In a number of cases, this Court has made clear the right to trial by an impartial jury is the heart of due process.

Historically, the Court has not required a particularized showing of actual bias which directly influenced jury deliberations to the prejudice of the aggrieved party. Examples begin with cases involving jury selection procedures. The jury must be selected from a representative cross-section of the community; if selection procedures exclude

a significant portion of the community, thereby increasing the risk of bias, those procedures are invalid. In Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968), the Court held that a defendant was denied his right to an impartial jury on the issue of sentence where veniremen having conscientious scruples against capital punishment were excluded. And in both Ballard v. United States, 329 U.S. 187, 91 L.Ed.181, 67 S.Ct. 261 (1946) and Taylor v. Louisiana, 419 U.S. 522, 42 L.Ed.2d 690, 95 S.Ct. 692 (1975), error was found in the exclusion of women from jury panels without a showing of prejudice in the individual case. Similarly, in Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Sct. 2163 (1972) the Court invalidated a selection procedure that resulted in the systematic exclusion of Negroes, finding it unnecessary that the defendant show actual harm or bias. This was so in Peters v. Kiff, supra, despite the fact the defendant challenging exclusion of blacks was white; in Taylor v. Louisiana, supra, the defendant

in Taylor v. Louisiana, supra, the defendant challenging the exclusion of women was male.

Neither has the Court required a specific showing of actual bias in cases involving pretrial publicity. In Irvin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639 (1961), this Court unanimously reversed a conviction where extensive and unfavorable publicity had preceded the trial, even though the trial judge had personally examined members of the jury panel and each indicated he could render an impartial verdict.[11] And in Rideau v. Louisiana, 373 U.S. 723, 10 L.Ed.2d 663, 83 S.Ct. 1417 (1963) the Court did not require a specific showing that a confession broadcast on television to the community actually prejudiced the jurors against defendant.

The Court has utilized an irrebuttable presumption of bias and prejudice even when the trial judge has questioned the jurors and

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[11] Petitioner herein would no doubt complain that the Court in Irvin v. Dowd, supra, was wrong in making a "de novo determination" of each jurors' mental attitude.

found no prejudice. In Marshall v. United States, 360 U.S. 310, 3 L.Ed.2d 1250, 79 S.Ct. 1171 (1959), the Court reversed a conviction where some jurors had read newspaper articles containing information of a character which was so prejudicial it could not be directly offered as evidence; each juror had told the trial judge that he would not be influenced by the articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against the defendant as a result of the articles. Similarly, in Leonard v. United States, 378 U.S. 544, 12 L.Ed.2d 1028, 84 S.Ct. 1696 (1964) (per curiam), the Court held that prospective jurors who had heard the trial court announce the defendant's guilty verdict in the first trial should be automatically disqualified from sitting on a second trial on similar charges.

Contact with the jury by third parties that might affect the jury's impartiality is presumptively prejudicial. In Turner v.

Louisiana, 379 U.S. 466, 13 L.Ed.2d 424, 85 S.Ct. 546 (1965) a conviction was reversed where during the trial the jury was in the care and custody of two deputy sheriffs who were two principal prosecution witnesses, even though the trial judge conducted a hearing and found that there was no evidence that either deputy had talked with any member of the jury about the case itself. The court said "it would be blinking reality not to recognize the extreme prejudice inherent in this continual association..." Id. at 473. And in Remmer v. United States, 347 U.S. 227, 98 L.Ed. 654, 74 S.Ct. 450 (1954), the Court ruled that any communication with a juror during a trial about the matter pending before the jury, "is, for obvious reasons, deemed presumptively prejudicial." Id. at 229. Though the presumption is not conclusive, "the burden rests heavily upon the Government to establish after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant. Ibid. After the hearing

on remand, the trial judge found that the juror was a "forthright and honest man," that the incident was "entirely harmless" and "did not have the slightest bearing upon the integrity of the verdict nor the state of mind of the foreman of the jury, or any members of the jury." Remmer v. United States, 350 U.S. 377, 379, 100 L.Ed. 435, 76 S.Ct. 425 (1956). This Court again reversed, stating "neither Mr. Smith nor anyone else could say that he was not affected in his freedom of action as a juror." Id., at 381. See also Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977), cert. denied 435 U.S. 924 (1978).

The Court has required inquiry into prejudice even when there was no evidence that a particular juror was biased. In Ham v. South Carolina, 409 U.S. 524, 35 L.Ed.2d 46, 93 S.Ct. 848 (1973) the Court held that a Negro defendant may not be denied the opportunity to question prospective jurors as to racial bias when the circumstances suggest the need for such questions. A generalized but thorough inquiry

into the impartiality of prospective jurors is still necessary even when questions about racial prejudice are not required. Ristaino v. Ross, 429 U.S. 589, 47 L.Ed.2d 258, 96 S.Ct. 1617 (1976).

In summary, the Court historically has not required a particular showing of actual bias which directly influenced jury deliberations to the prejudice of the aggrieved party; has regarded the absence of a balanced perspective in jury selection procedures as a recognizable form of prejudice, without requiring a specific showing of bias against the individual defendant; has conclusively presumed juror bias and prejudice even where the jurors involved denied it and a trial judge so ruled; has utilized a presumption of prejudice and placed the burden on the Government to overcome the presumption; and has insisted that criminal defendants be given a fair and meaningful opportunity in voir dire to determine whether prospective jurors are biased. Given that fairness and reliability of jury determinations are at stake, this is not too high a standard.

"The injury is not limited to the defendant - there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts." Ballard v. United States, supra, 329 U.S. at 195.

Respondent submits the Court of Appeals correctly ruled the information suppressed by jury foreman Payton indicated his probable bias.[12]

V. THE COURT OF APPEALS WAS CORRECT IN NOT REMANDING THE CASE FOR A HEARING.

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[12] Petitioner (at 28) advances the proposition that "bias alone" does not render a juror "incompetent;" that apparently a "perfectly fair" jury verdict can somehow be rendered by biased competent jurors. Quite a proposition from one who seeks to invoke due process - and clearly incorrect. "The theory of the law is that a juror who has formed an opinion cannot be impartial." Reynolds v. United States, 98 U.S. 145, 155, 25 L.Ed. 244, ---S.Ct.---(1878). "If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed." Reynolds, Id., at 157. Also see, Aldridge v. United States, 283 U.S. 308, 75 L.Ed. 1054, 51 S.Ct. 470 (1931) - clearly recognizing that bias or prejudice is an element of the competency of a juror.

"Impairment of the right [of peremptory challenge] is reversible error without a showing of prejudice." Swain v. Alabama, supra, 380 U.S. at 219. Remand for a hearing to determine the probable or actual bias of jury foreman Payton is thus superfluous. Are we to have a hearing to ask jury foreman Payton if he harbored an "unacknowledged or unconscious bias?" See Darbin v. Nourse, supra, 664 F.2d at 1113.

Petitioner relies upon Smith v. Phillips, 455 U.S. 209, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982) as requiring a hearing in this case. It does not because Smith, supra, did not involve the issue of impairment of the right of peremptory challenge.[13] In Smith, supra, the Court declined to imply bias in cases of improper jury contact where a hearing on juror misconduct was held and no evidence of actual bias was revealed. In

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[13] Indeed, in Smith, supra, the defense had several unused peremptory challenges, Ibid., 455 U.S. at 212, n.4.

reaching its conclusion, the Court in Smith, supra, relied on Remmer v. United States, 347 U.S. 227, 98 L.Ed. 654, 78 S.Ct. 450 (1954), wherein a juror in a federal criminal trial was offered a bribe in exchange for a favorable verdict. The juror reported the incident to the trial judge who ordered an investigation after consulting with the prosecuting but not defense attorneys. The investigators concluded the purported bribe had been made in jest. After trial, defense counsel learned of the incident and filed a motion for a new trial, which was denied without a hearing. This Court reversed, stating:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . .. The presumption is not conclusive, but the burden rests heavily upon the government to establish, after notice to and hearing of defendant, such contact with the juror was harmless to defendant. Id. at 229.

Smith, supra, and Remmer, supra, are certainly distinguishable from the instant case.

In Smith, supra, as in Remmer, supra, the allegation of juror partiality arose out of contact with third persons rather than a juror's suppression of information requested on voir dire. The issue of impairment of the important right of peremptory challenge was not and could not have been raised in Smith, supra, and Remmer, supra, because the facts of which the defendant complained occurred after the jury had been impaneled, i.e. after the point at which the defendant could have exercised a peremptory challenge. Smith, supra, does not require a hearing to determine the probable or actual bias of a juror who suppressed information on voir dire impairing Respondent's right of peremptory challenge. To do so would be to absolutely ignore the whole purpose of peremptory challenge, as so eloquently articulated by Justice White in Swain v. Alabama, supra.

Respondent submits this ends the inquiry. Proof of actual bias is simply wholly inconsistent with the concept of peremptory challenge. However, there are additional persuasive reasons not to require a hearing in this case.

As long ago as 1857, the Courts recognized it would take an individual of extraordinary character to own up to a bias:

> [F]ew men will admit that they have not sufficient regard for truth and justice to act impartially in any manner, however much they may feel in regard to it, and every day's experience teaches us that no reliance is to be placed in such declarations. People v. Gehr, 8 Cal. 359, 362 (1857).

Little psychological insight is needed to realize that a juror called to testify before a federal judge as to why he failed under oath to answer a question on voir dire would certainly downplay any significance in the act. Is there anyone so naive that expects such a juror to admit he lied under oath, to admit he concealed information for fear of counsel uncovering an actual or probable bias? Even assuming no evil purpose in the suppression of information, the juror may harbor a bias of which he himself is unaware or which, because of his impaired objectivity, he unreasonably believes he can overcome. As recognized by the Court in Irvin v. Dowd, supra, 366 U.S. at 727,

"The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man."

This Court has more specifically acknowledged the problem. In Peters v. Kiff, 407 U.S. 493, 33 L.Ed.2d 83, 92 S.Ct. 2163 (1972), the Court invalidated jury selection procedures, stating the procedures were unacceptable even when there is no proof of actual bias. 407 U.S. at 504. (Marshall, J., joined by Douglas and Stewart J.J.). The opinion explained that actual bias is virtually impossible to prove. Ibid. Thus, it is necessary to "decide on principle which side shall suffer the consequences of unfavorable uncertainty." Ibid. Given the great potential for harm, and the importance of the right to an impartial jury, doubts must be resolved in favor of the litigant against whom bias is indicated.

Implied bias must be the rule in cases such as the one at bar not only because actual bias is virtually impossible to prove, but also because proof of actual or even probable

bias here is apparently prohibited by Rule 606(b), F.R. Evid. While misconduct relating to the motives or emotions influencing a juror may be as improper as more objective misconduct, proof of such subjective misconduct generally is prohibited by operation of rules concerning impeachment of verdicts. In this case, reversal for a hearing at which (presumably) the burden would be placed upon Respondent to prove actual or probable bias or jury foreman Payton through the mouth of jury foreman Payton would surely be a hollow and futile opportunity. There could be no answers given "as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict ... or concerning his mental processes in connection therewith ...." Rule 606(b), F.R. Evid. A Catch-22 hearing will not protect Respondent's right to trial by an impartial jury, nor allow Respondent to show deprivation of his right of peremptory challenge.

It is for this very reason that courts have presumed prejudice. In United States v. Freeman, 634 F.2d 1267 (10th Cir. 1980), an F.B.I. investigator in the case who testified at trial was assigned to the jury room to operate a tape recorder for the jury; prejudice was presumed without inquiry because Rule 606(b) F.R. Evid. would make prejudice difficult to prove; a hearing was said to be "futile." Id. at 1269. However, see Krause v. Rhodes, 570 F.2d 563 (6th Cir. 1977) cert. denied 435 U.S. 924, 55 L.Ed.2d 517, 98 S.Ct. 1488 (1978) where the Court said Rule 606(b), Fed.R.Evid. would not prohibit testimony as to outside influences occurring during the trial; but the Court did not remand for a hearing "considering the problem of fading memories and the natural reluctance of a juror to admit that he had been improperly influenced" Id. at 570, and concluded that "such a hearing would be pointless." Id. at 569.

Accordingly, the Court of Apeals was correct in not remanding the case for a hearing which

is at once superfluous and futile.

VI. UNDER NO CIRCUMSTANCES IS PETITIONER ENTITLED TO ENTRY OF TO UPON THE VERDICT OF THE JURY.

Respondent, without taking a cross appeal, may urge in support of a judgment any matter appearing in the record, although involving insistence upon matters overlooked or ignored by the Court of Appeals. Dandridge v. Williams, 397 U.S. 471, 25 L.Ed.2d 491, 90 S.Ct. 1153, reh. den. 398 U.S. 914, 26 L.Ed.2d 80, 90 S.Ct. 1684 (1970); Dayton Board of Education v. Briarman, 433 U.S. 406, 53 L.Ed.2d 851, 97 S.Ct. 2766 (1977). Respondent hereby urges in support of the judgment of the Court of Appeals granting Respondent a new trial, those 7 additional assignments of error in Brief of Appellant in the Court of Appeals.

If the judgment below is reversed, Respondent further urges as error the trial court's denial of Respondent's motions to approach the jurors (J.A. 67 and 86) and denial of leave to subpoena the jurors to give testimony at a hearing on Respondent's

motion for a new trial (J.A. 90 at 94), which Respondent also urged as error below. (Brief of Appellant, Issue 2).

If the judgment of the Court of Appeals not be affirmed, and if this Court determines it will not examine on certiorari Respondent's 7 additional assignments of error, then it would only be appropriate to remand the case to the Court of Appeals. Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 91 L.Ed. 1024, 67 S.Ct. 798 (1946). In no event is Petitioner entitled to entry of judgment upon the verdict of the jury.

CONCLUSION

The judgment of the United States Court of Appeals granting Respondent a new trial must be affirmed.

Respectfully submitted,

JONES, SCHROER, RICE, BRYAN
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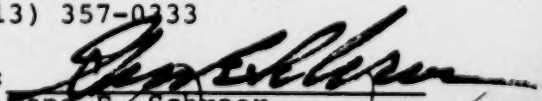
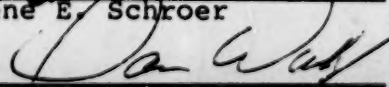
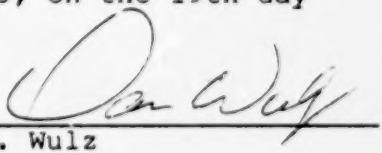
By: 
Gene E. Schroer

By: 

CERTIFICATE OF SERVICE

I, Dan L. Wulz, in compliance with Rule 28.3 and 28.5 of this Court, hereby certify that all parties required to be served have been served by my causing hand delivery of three copies of the above and foregoing Brief of Respondents on the Merits at the office of counsel for Petitioner, Donald Patterson, 400 First National Bank Building, Topeka, Kansas 66603, on the 19th day of September, 1983.



Dan L. Wulz